TOUHY REQUESTS

Responding to Subpoenas and Requests for Information and Witnesses

U.S. Army Litigation Division

References

- DODD 5405.2, *Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses*
- 32 C.F.R. 516, Subpart G, *Release of Information and Appearance of Witnesses*
- AR 27-40, Chapter 7, *Release of Information and Appearance of Witnesses*

Overview

- A "*Touhy*" request is a request for official information in support of litigation where the Government is not a party to the litigation
  - applies to any request for witnesses, documents, or information for all types of litigation
  - comes in the form of subpoena or letter
  - asking SJA or legal advisor to locate the witness or evidence and coordinate production
- The SJA/Legal Advisor can handle most requests without LITDIV assistance
- LITDIV is always available to assist

Valid Request

- AR 27-40 requires that the information be sought in support of judicial or quasi-judicial proceedings
- Must request factual information (no opinion or expert)
- Must state nature and relevance of the information sought
- Must provide 14 days advanced notice
- If necessary, requestor presents Privacy Act waiver or court order, signed by judge or magistrate, for Privacy Act protected information

When to Deny

- Request is unduly burdensome or inappropriate under applicable court rules-7-5b(2)
- Disclosure inappropriate under procedural rules governing matter in which the request arose-7-5b (3)
- Disclosure would violate a statute, executive order, regulation, or directive-7-5b(4)
- Disclosure is not appropriate under relevant substantive law concerning privilege-7-5b(5)
- Disclosure interferes with enforcement proceedings, compromises constitutional rights, reveals identity of source or informant, discloses trade secrets-7-5b(7)

SJA Should Forward If . . .

- SJA unable to resolve—LITDIV
- Involves affirmative litigation—LITDIV
- Involves patents, copyrights, privately developed technological info, or trademarks—IP Law
- Involves taxation—KFLD
- Involves communication, transportation, or utility service proceedings—REG Law
- Involves environmental law—ELD
- Involves contract appeals before ASBCA—KFLD
- Procurement fraud and qui tam—PFD/KFLD
- Involves classified or sensitive information—LITDIV
- Involves IG records—LITDIV/TIG LEGAD
- Involves expert testimony—LITDIV (MEDCOM can approve without forwarding)

Subpoenas

- Letter is the preferred method to request information, but . . .
- A federal court (competent jurisdiction) may issue a subpoena in order to compel the Army to produce witnesses or information
- State court and administrative subpoenas are treated as *Touhy* requests. Therefore, they must comply with AR 27-40
- Do not ignore subpoenas. When request is denied:
  - If Federal court action, contact local AUSA to enter appearance and argue reason that request was denied
  - If State court action, provide court with 27-40 and letter indicating reason request was denied. SJA can ask AUSA to quash subpoena or stay proceedings pending resolution. Informal resolution is best COA

Witnesses

- Appears at the commander's discretion—mission dependent
- No expense to the United States
- Army authorizes testimony, it does not compel
- If approved, presence voluntary subject to possible court order
- Approval sets left and right limits for testimony
  - no opinion
  - extent of expert testimony
  - extent of classified disclosure
- Army-designated attorney must be present
- Court in *Touhy* held, even if authorized to testify, agency may direct witness not to answer if outside scope of approval

Questions